89-943

No. ——

DEC 13 1989

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THOMAS J. KLINE, INC.,

Petitioner,

v.

LORILLARD, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court below erred in reversing a plaintiff's jury verdict under the Robinson-Patman Act because the court refused to equate unjustified discrimination by a commodities supplier in the trade credit available to competing wholesaler customers with price discrimination.

2. Whether the court below erred in holding that the trial court had clearly abused its discretion in admitting, over no objection, the expert testimony of an economist with a Masters Degree in Business Administration from the University of Chicago.

3. Whether the court below erred in reversing a plaintiff's jury verdict for breach of a requirements contract because the court rejected parol evidence that language in a letter expressed quantity sufficient to satisfy the Statute of Frauds of the Uniform Commercial Code, contrary to its authors' directive that such evidence is paramount.

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OPINIONS BELOW

The June 30, 1989 opinion of the United States Court of Appeals for the Fourth Circuit is reported at 878 F.2d 791. (App. 1a-22a).

JURISDICTION

The opinion sought to be reviewed was entered on June 30, 1989. Following a timely petition for rehearing, and suggestion for rehearing in banc, the Court of Appeals denied said petition on September 14, 1989. (App. 66a). The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), provides in pertinent part:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. *Provided*, that nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered . . .

The Maryland Antitrust Act, § 11-204(a)(3), Commercial Law Article (1983), provides:

> *Prohibited conduct.*—A person may not:
>
> Directly or indirectly discriminate in price among purchasers of commodities or services of like grade and quality, if the effects of the discrimination may:
>
> (i) Substantially lessen competition;
>
> (ii) Tend to create a monopoly in any line of trade or commerce; or
>
> (iii) Injure, destroy, or prevent competition with any person who grants or knowingly receives the benefit of the discrimination or with customers of either of them;

Rule 702, Federal Rules of Evidence (1984), provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the

> evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

The Maryland Uniform Commercial Code—Sales, § 2-201(1), Commercial Law Article (1975), provides:

> Except as otherwise provided in this section a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.

STATEMENT OF THE CASE

The critically important issue this case presents is whether given the Supreme Court's long and emphatic line of holdings that payment now costs more than payment later, such that to sell on credit is to offer a discount in price, an appellate court may ignore a jury's finding that a seller engaged in illegitimate credit discrimination, and reverse a plaintiff's verdict under the Robinson-Patman Act.

A. The Facts

This case arose in early February, 1986, when Lorillard, Inc. ("Lorillard"), one of six major tobacco products manufacturers, abruptly discontinued sales to Thomas J. Kline, Inc. ("Kline")[1], then an Elkton, Maryland tobacco distributor, on the credit terms confirmed in a letter dated January 15, 1986.

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[1] Kline has neither subsidiaries nor affiliates.

This action was unprecedented in the 18-year relationship between Lorillard and Kline or its predecessor, Wm. B. Merrey & Sons, Inc. ("Merrey").[2] Moreover, while revoking Kline's credit, Lorillard liberalized that afforded Kline's competitors, extending payment schedules and increasing credit limits. Kline eventually was able to resume purchasing on credit, but with a strict limit of $60,000.00 secured by a letter of credit, for which it paid a fee.

Lorillard lacked any business justification for its act. The precipitating event, the bankruptcy of Merrey's former owner Paolella, was proved at trial to have nothing to do with Kline. Nor did Lorillard perform the rudimentary factual investigation that would have established Kline's good faith. Further, Lorillard knew its demand would destroy Kline. As Lorillard testified at trial, only "around two percent" of its customers paid cash in advance, or provided "hard security" instead. It was Lorillard's policy "to be as cooperative as possible" with its "thinly capitalized" distributors, there being no

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[2] Merrey was for a number of years prior to 1980 a family-run cigarette and sundries wholesaler owned by Mr. Thomas J. Kline, Jr. From the end of 1980, when Mr. Kline sold Merrey to Philadelphia-based distributor M. Paolella and Sons, Inc. ("Paolella"), to 1985, when he reacquired Merrey, it was managed by Mr. Kline as a separate division of Paolella. Through its history, Merrey purchased its requirements from Lorillard on open credit terms.

Mr. Kline sought to continue this relationship, an incident of direct dealer status as well as a prerequisite to profitable operations, after he repurchased his company in December 1985 and commenced to operate under the Kline name. Based on Merrey's long unblemished credit record, as well as the financial information submitted by Mr. Kline, Lorillard granted Kline's request to purchase on a direct basis so that it could obtain its reasonable Lorillard requirements on Lorillard's normal credit terms. On January 15, 1986, this was confirmed in a letter signed by Lorillard. (App. 4a-5a). No credit limitation is stated in this confirmation, and in fact no such limit was announced or applied prior to its abrupt withdrawal of Kline's credit.

"way of supplying and selling to those customers" except on credit.

Kline, like Lorillard's other wholesalers, could not derive a profit without trade credit. So Kline was forced to join the tiny minority providing to Lorillard a letter of credit—which Lorillard did not accept until March 3, 1986, a full month later. By that time, Kline had permanently lost market share to competitors to whom Lorillard granted liberalized credit, and who expanded their own customer bases to include Paolella's former customers with that help. Further, in view of the extremely low profitability of cigarette wholesaling, the price increase resulting from Kline's purchase of a letter of credit threatened ultimately to put it out of business entirely.

B. Proceedings Below

To avert this outcome, Kline filed suit in the Circuit Court for Cecil County, Maryland, under Maryland's versions of the Robinson-Patman Act [3], and the Sales Article of the Uniform Commercial Code [4], and for common law business torts.

Finding Kline's concerns compelling, the Cecil County Circuit Court ex parte enjoined Lorillard to grant unsecured credit to Kline up to $60,000.00 (App. 23a). Thereafter, Lorillard removed the action to the United States District Court for the District of Maryland, and Kline amended its complaint to assert the exclusively federal Robinson-Patman cause of action. A temporary restraining order was issued on April 15, 1986 (App. 23a) and on May 2, 1986, the District Court granted plaintiff's motion for a preliminary injunction (App. 24a), enabling Kline to remain in business during the litigation.

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[3] Maryland Uniform Commercial Code, § 11-204(3) (1983).

[4] Maryland Uniform Commercial Code, §§ 2-101 et seq. (1975).

Lorillard filed a motion for summary judgment on all counts of the amended complaint on June 1, 1987, which was denied by order and memorandum dated July 23, 1987. (App. 23a-38a).

A jury trial commenced on September 14, 1987. Lorillard's oral motion for a directed verdict at the close of plaintiff's case was granted as to the tort counts and denied as to the remaining claims. At the conclusion of all of the evidence, Lorillard's motion for directed verdict on the remaining counts was reasserted and again denied.

On September 23, 1987, the jury returned a plaintiff's verdict on the remaining counts, in the amounts of $1,000,000 for breach of contract and $526,733 for the Robinson-Patman violation. (App. 99a). On October 6, 1987, final judgment was entered pursuant to Fed.R.Civ. P. 54(b) in the amount of $2,053,466, plus interest and costs. (App. 39a-43a). Lorillard's motion for judgment notwithstanding the verdict or, in the alternative, for new trial or remittitur was denied by order and memorandum dated November 16, 1987. (App. 44a-50a). Thereafter, Plaintiff was awarded attorney's fees in the amount of $306,727.80. (App. 51a-61a). On December 15, 1987, an order was issued permanently enjoining and restraining Lorillard from unlawfully discriminating against the plaintiff with respect to price, including credit terms. (App. 62a-64a). Costs were taxed against Lorillard on January 28, 1988. (App. 65a).

Lorillard filed timely notices of appeal to the United States Court of Appeals for the Fourth Circuit, resulting in reversal on June 30, 1989, by a panel comprised of Judges Winter, Sprouse and Chapman. (App. 1a). In dissent from the opinion written by Judge Chapman, Judge Sprouse observed, with regard to Kline's Robinson-Patman claim:

> I believe that the principles concerning credit restrictions are controlled by *Catalano, Inc. v. Target*

Sales, Inc., 446 U.S. 643, 648 (1980) (per curiam), in which the United States Supreme Court stated:

> "It is virtually self-evident that extending interest-free credit for a period of time is equivalent to giving a discount equal to the value of the use of the purchase price for that period of time. Thus, credit terms must be characterized as an inseparable part of the price."

The general application of this proposition is illustrated by the Court's application of *Catalano* in the federal gift tax context in *Dickman v. Commissioner of Internal Revenue*, 465 U.S. 330, 337-38 (1984). This principle, when applied to the present case, requires that the credit restrictions imposed by Lorillard on Kline be viewed as equivalent to it charging a higher price.[5]

The panel, however, held that *Catalano* was not controlling (App. 14a), that as a matter of law Kline had not suffered discrimination "of any magnitude" (App. 15a), that Kline's expert should have been prohibited from testifying (App. 19a), and that the quantity requirement of the U.C.C.'s Statute of Frauds must be satisfied by a dictionary approved word (App. 8a), not in the context of the parties' actual usage. Substituting its

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[5] (App. 21a-22a). As to the contract question, the dissent states:

> Accepting as we must, Kline's testimony, Maryland's prerequisites for a requirements contract have been met. This is demonstrated by a fuller quotation from Cavalier Mobile Homes v. Liberty Homes, 53 Md. App. 379, 395, 454 A.2d 367, 377 (1983) in which the Maryland Court of Special Appeals indicated that the statute of frauds is satisfied "where the quantity term is not numerically stated, . . . some writing . . . indicates that the quantity to be delivered under the contract is a party's requirements." The jury, with a proper instruction and with the benefit of Kline's testimony about the language in the letter, specifically found that the letter expressed Lorillard's agreement to meet Kline's requirements. I agree, therefore, with the district court that there simply is no reason to disturb that jury finding.

(App. 21a).

judgment for the trial judge and jury's on all these issues, the panel reversed.

Kline filed a timely petition for rehearing and suggestion for rehearing in banc, which was denied by the United States Court of Appeals for the Fourth Circuit on September 14, 1989. (App. 66a). Although not reflected in the record, Kline's business failed following vacation of the permanent injunction, with most of its customers acquired by one of the firms whose credit terms Lorillard liberalized when Kline's were withdrawn.

REASONS FOR GRANTING THE WRIT

As Lorillard testified at trial, fewer than two percent of its wholesale customers are denied open trade credit, although most of these are thinly capitalized and operating on extremely narrow profit margins. Indeed it is precisely because of the low profitability of cigarette distribution that Lorillard and its competitors extend credit so freely: wholesalers lack the cash reserves to pay their suppliers until they are paid by their own retail customers, and institutional lenders will not assume the risk.

Lorillard, however, like other manufacturers, is able to spread the risk of default, such as occurred when Paolella failed, by factoring the cost into its pricing structure. Seen in this light, trade credit is simply another way to offer a discount and is not the product of an objective evaluation of credit worthiness, as a bank might perform. The Supreme Court recognized this reality in *Catalano* when it held that an agreement among competitors to eliminate credit was a form of price fixing, unlawful on its face, and refused even to hear the defendants' offered justifications. The Court's opinion recognizes that credit decisions may be, and often are, efforts to disguise price manipulations and should be treated no differently.[6]

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[6] Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 648 (1980).

Yet the Fourth Circuit, dismissing *Catalano* as "a "price-fixing case brought under the Sherman Act," [7] elevates credit to the sacrosanct, permitting a supplier to escape scrutiny under the Robinson-Patman Act merely by invoking a business justification, even if, as here, the jury is convinced by contrary evidence that the discrimination was in fact illegitimate.

Because the opinion below creates a safe harbor for violation of the Robinson-Patman Act, enabling manufacturers who sell on time, which most undoubtedly do, to escape antitrust scrutiny by tampering with credit in lieu of price, and because this result contravenes direct precedent of this Court as well as the purpose of the Act, this is a case of exceptional national importance, meriting the grant of certiorari.

Also compelling review is the Fourth Circuit's introduction of an incomprehensible standard for admissibility of testimony of an expert, whose qualification was conceded at trial by Lorillard. As every other Circuit Court holds, where no articulable deficiency disqualifies a witness, which the Fourth Circuit concedes, it is within the discretion of the trial judge to admit the testimony.

Finally, the Fourth Circuit's decision that parol evidence is inadmissible to explain a writing offered to satisfy Section 2-201 of the Uniform Commercial Code warrants review because it creates a conflict with the decisions of other circuits, significantly undermining the uniformity and predictability that is the essential and salutary function of the Code.

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[7] (App. 10a).

I. The Decision That Unjustified Trade Credit Discrimination Is Beyond the Scope of the Robinson-Patman Act Is Inconsistent With Legislative Intent, In Direct Conflict With Decisions of the Federal Trade Commission and Other Circuits, and Irreconcilable With Holdings of the Supreme Court.

Not only *Catalano*, but a number of other Supreme Court opinions as well, underscore the equivalence of price and credit.[8] In *Catalano*, the Court held that a horizontal agreement among competitors "to terminate the practice of giving credit is . . . tantamount to an agreement to eliminate discounts, and thus falls squarely within the traditional per se rule against price fixing." 446 U.S. at 648. Although the Fourth Circuit minimizes the significance of the price/credit equation, restricting *Catalano* to the price-fixing context, the Supreme Court's reasoning is global:

> It is virtually self-evident that extending interest-free credit for a period of time is equivalent to giving a discount equal to the value of the use of the purchase price for that period of time. Thus, credit terms must be characterized as an inseparable part of the price.

Id. As support for this "self-evident" proposition, the Court cited authority in the price discrimination area: "To charge cash and credit customers the same price is, economically speaking, to discriminate against the former." P. Areeda, *Antitrust Analysis*, 878 (2d ed. 1974).

The court below distinguishes *Catalano* as "a classic conspiracy case" while "here there is no allegation of

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[8] Last year, in Monessen Southwestern Ry. Co. v. Morgan, 486 U.S. 330 (1988), the Court reaffirmed the longstanding "self-evident" principle that damage awards must be based on present value because "a given sum of money in hand is worth more than the like sum of money payable in the future." See also Chesapeake and Ohio Ry. Co. v. Kelly, 241 U.S. 485 (1916); Jones and Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523 (1983); St. Louis Southwestern Ry. Co. v. Dickerson, 470 U.S. 409 (1985).

conspiracy." (App. 14a). This distinction is meaningless. Whether single or multi-firm conduct, price discrimination or price fixing, is charged, the operative word "price" does not change meaning.

Although the Robinson-Patman Act does not define price, its prohibition of direct or indirect discrimination encompasses all differences in terms affecting the actual cost to buyers. As the Supreme Court held in *Corn Products Refining Co. v. FTC*, 324 U.S. 726, 740 (1945), where the defendants allowed their favored customers to secure options for the purchase of glucose and to take delivery at prices in effect prior to announced increases for longer periods than other buyers:

> the present discriminations in terms of sale operated to permit the favored customers to purchase at a lower price than other customers, so that their only practical effect was to establish discriminations in price, precisely the evil at which the statute was aimed.

It is axiomatic and oft articulated[9] that a customer forced to pay cash today buys at a higher price than a customer who pays later. There is nothing in the Act that protects this particular form of price discrimination. By equating the extension of credit with the giving of a discount, the Court in *Catalano* placed credit discrimination squarely within the traditional ambit of the Robinson-Patman Act.[10] And indeed the federal agency with primary antitrust expertise, the Federal Trade Commission, affirmed by the Third Circuit has held that credit discrimination is a discrimination in price. In *Viviano Macaroni Company*, FTC Docket 8666, CCH Trade Reg. Rep. Paragraph 18, 246 (1968), aff'd, 411 F.2d 255 (3d Cir. 1969), the Commissioner found discriminatory a

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[9] See n.8, *supra*.

[10] See, e.g., U.S. v. Borden Co., 370 U.S. 460 (1962) (quantity discounts constitute direct price discrimination).

macaroni manufacturer's credit granting practices for reasons remarkably apt to Kline's situation:

> Thus, one of respondent's large customers who was not offered the extended credit terms testified that "in 20 days, the chances are that the merchandise we would have bought would have been sold by that time, and in most cases the moneys would have been collected for it and, in effect, we would have been operating on Vimco's money" (tr. 346-347). He further stated that his company borrows short term money to enable it to meet discount terms of its suppliers and that "If we had an extra ten days, that would give us a half million dollars of extra capital in our business" (tr. 347). Several other nonfavored customers testified that an extension of credit to 2%-20 days would be significant and a definite advantage for the reason that this would enable them to sell the products before they have to pay for them, thus giving them more cash to use in other ways (tr. 314, 1094, 1118, 1208).
>
> Considering this testimony in light of the intensively competitive situation existing in the retail food industry, we find that respondent's discriminatory extension of credit terms to Loblaw, even considered separate and apart from the other discriminatory price reductions in its package deal, may have the effect of substantially lessening competition.

The circuit courts are less clear as to the appropriate treatment of credit discrimination, though none are as restrictive as the Fourth Circuit. The Sixth Circuit, after *Catalano*, holds that a manufacturer's refusal to extend credit "based upon valid business considerations does not violate § 2(a)", but requires the seller to demonstrate "the existence and application of business factors in making its credit decisions." *Bouldis v. U.S. Suzuki Motor Corp.*, 711 F.2d 1319, 1325-26 (6th Cir. 1983).[11] Only

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[11] *Bouldis* is consistent with *Catalano* and with Section 2(a) of the Robinson-Patman Act insofar as it puts the burden on the

if a buyer truly cannot "submit any probative evidence" that credit distinctions are based on invalid considerations is the defendant entitled to judgment. *Id.* at 1326.

The trial court in Kline's case followed *Bouldis* in instructing the jury that:

> A difference in credit terms that is based on legitimate credit-granting criteria, however, such as the borrower's financial strength, business experience, credit history, net worth, capital, cash position, personal guarantees, and business success does not constitute price discrimination.
>
> If the plaintiff has not proved that the defendant gave other purchasers favorable credit terms that were not available to the plaintiff and that were not based on legitimate business reasons, then your verdict must be for the defendant.[12]

(App. 82a).

The Kline jury was not persuaded by Lorillard's articulated business justifications, and found Kline to have proved that Lorillard's disparate treatment of the plaintiff and its competitors was not based on legitimate credit-granting criteria. (App. 97a).

Nonetheless, the Fourth Circuit, quoting the pre-*Catalano* opinion in *Craig v. Sun Oil Co.*, 515 F.2d 221 (10th Cir. 1975), cert. denied, 429 U.S. 829 (1976), concludes that as "a matter of law the present case does not present an extreme situation or one of any magni-

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defendant to justify its discrimination by "differences in the costs of manufacture, sale, or delivery . . ." See Borden, supra, 370 U.S. at 467 (cost justification defense requires defendant to show "actual cost differences").

[12] Accord, Court's Instruction No. 30. (App. 133a). See also Cemar, Inc. v. Nissan Motor Corp., 678 F. Supp. 1091, 1101 (D. Del. 1988); Robbins Flooring, Inc. v. Federal Floors, Inc., 445 F. Supp., 4, 9 (E.D. Pa. 1977); Glowacki v. Borden, Inc., 420 F. Supp. 348, 354 (N.D. Ill. 1976); Carlo C. Gelardi Corp. v. Miller Brewing Co., 502 F. Supp. 637, 648 (D. N.J. 1980).

tude." (App. 15a). But no court, not even *Craig*,[13] has gone so far as the Fourth Circuit in shielding from scrutiny a seller's credit discrimination, because this is the first time a jury has found invidious price discrimination.

Ignoring the ample factual foundation for Kline's verdict,[14] the Fourth Circuit accepts at face value Loril-

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[13] The basis for the Tenth Circuit's holding in Craig was the plaintiff's apparent failure to allege that the defendant's credit distinctions were unjustified. 515 F.2d at 224.

[14] To briefly summarize hundreds of transcript pages, prior to Lorillard's revocation of Kline's credit privileges in early 1986, Mr. Kline had owned or managed the company for nearly 20 years. Throughout this period, Kline predecessor Merrey operated under the cigarette manufacturers' normal credit terms notwithstanding its rapid expansion. Further, it never failed to make a timely payment to any cigarette supplier, including Lorillard, always paying the bills at least on time and often early.

Indeed, Lorillard's close scrutiny of Merrey's payment history during these two decades unearthed only one instance and that back in 1979, when Merrey was asked and agreed to pay Lorillard invoices on shortened nine-day terms. There is no evidence indicating that Merrey had failed to meet the then twelve-day payment schedule, or that its credit history was in any respect clouded when the events of February 1986 transpired.

At trial, Lorillard offered no explanation why Paolella's January 1986 failure and the resulting foreclosure by Maryland National Industrial Finance Corporation ("MNIFC") rendered Kline uncreditworthy. And absent any reason to believe that Kline, with an unblemished credit record, was itself likely to default on its own loan from MNIFC, which Lorillard did not even assert, the whole point is an obvious pretext for Lorillard to vent its spleen on a former affiliate of Paolella, the firm whose bankruptcy caused Lorillard to lose substantial unpaid-for inventory.

The punitive and retaliatory nature of Lorillard's conduct is illuminated in the context of its disparate treatment of its other wholesale customers. In February 1986, while Kline was required to wire cash in advance, Lorillard granted liberalized credit to all other dealers requesting it, encouraging Kline's competitors to expand to fill the void left by Paolella.

But there was no legitimate basis to distinguish between these favored customers and Kline. According to Lorillard's expert

lard's version of the story. (App. 15a-17a). Certainly, this appellate fact finding is contrary to fundamental standards of judicial review. But even more troubling, the decision below signals the path to evasion of the Robinson-Patman Act. If a seller wishes to discriminate among its customers, all it need do in the Fourth Circuit is confine the discrimination to the trade credit arena, and offer some business justification for its conduct. Once the requisite incantation is voiced, the defendant is secure in knowing that the plaintiff's contrary evidence is irrelevant.

The Supreme Court, having recently reaffirmed the continuing viability and importance of the Robinson-Patman Act,[15] should not permit its evisceration in this guise.

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economist, Dr. Linneman, who studied "in a systematic way the credit decisions being made by Lorillard", the majority of its customers "tend to be very what we call thinly capitalized, not a lot of equity, quite a bit of debt; and in just the normal relationships you have to work out some way of supplying and selling to those customers." Lorillard acknowledged that it demands cash in advance or hard security from only "around two percent" of these customers. Dr. Linneman described Lorillard's general credit-granting policy as "an attempt by Lorillard to be as cooperative as possible, to help their customers to be able to do business with them with a minimal amount of intervention." Its treatment of Kline was plainly a departure, as the jury found.

[15] In Falls City Indus., Inc. v. Vanco Beverage, Inc., 460 U.S. 428 (1983), the Court described the Act's "prophylactic purpose" and its "general applicability [prohibiting] discrimination generally." *Id.* at 435-36. Applying Falls City and J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557 (1981), the Kline jury found Lorillard's conduct to result in competitive injury as well as antitrust injury to Kline. (App. 97a-98a).

II. The Decision to Disqualify Expert Testimony Admitted Without Objection Conflicts With Decisions of Other Circuits and is Contrary to the Federal Rules of Evidence Granting to the Trial Court Wide Discretion to Allow Such Testiomny.

At trial, Kline's expert Lilli A. Gordon testified regarding Lorillard's "business justification" for restricting Kline's credit and as to the substantiality of the resulting price differential, without objection from Lorillard. The Fourth Circuit, though it discerns no single fact that disqualifies Ms. Gordon (App. 19a), concludes nonetheless that the witness cannot satisfy even the minimal requirements of Fed. R. Evid. 702.

But as every other circuit holds, a trial court's decision to admit expert testimony is so broad that reversal depends on a showing of manifest abuse, not on the appellate court's undefined feeling that the expert is unqualified.[16]

The Fourth Circuit's decision is, moreover, directly at odds with the purpose of Rule 702 of the Federal Rules of Evidence, broadly defining an expert by reference to his possession of helpful "knowledge, skill, experience, training or education." Professor Rothstein describes "the intent of the rule . . . to increase receptivity to experts, and if there is any limit to the trial judge's discretion, it may be mainly a limit on discretion to exclude." Rothstein, *Federal Rules of Evidence* 268 (2d ed. 1987).

The trial court in Kline did not commit clear, or indeed any, error in allowing Ms. Gordon's testimony, as she was fully qualified. Ms. Gordon is an economist by education.[17] Her training prepared her "to analyze a company's

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[16] See, e.g., U.S. v. Bermudez, 526 F.2d 89 (2d Cir. 1975), cert. denied, 425 U.S. 970; Barnes v. General Motors Corp., 547 F.2d 275 (5th Cir. 1977).

[17] Ms. Gordon's Master's Degree in Business Administration from the University of Chicago concentrated in economics, and included

financial data, for example, its balance sheet, its income statements, its cash flow statement, in order to make assessments of the financial viability or the financial health of firms and in order to be able to make comparisons of the financial wellbeing of one firm versus another."

As far as Ms. Gordon's pertinent employment experience as a financial economist since 1980 is concerned, it requires "analyzing firms, analyzing their financial data, trying to make assessments as to how profitable they are, how risky the business is, or else how profitable the business is, compared to its competitors, or how profitable a group of businesses are compared to, say, businesses in another industry for example." Beween one-half and three-quarters of her work involves antitrust issues, including price discrimination.

The court below's denial that Ms. Gordon's expertise in finance and accounting can assist a jury called upon to evaluate Lorillard's credit granting criteria and to compare its customers' balance sheets not only conflicts with the decisions of other circuit courts,[18] but seriously impairs the ability of antitrust plaintiffs to present their cases. If, as happened here, a financial economist with an advanced degree from the University of Chicago who is employed primarily in antitrust analysis and whose testimony is admitted without objection, can be disqualified for no precise reason on appeal, the chilling effect on antitrust enforcement is apparent.

Ph.D. courses in that subject. She has published on the subject as well.

[18] In Spray-Rite Service Corp. v. Monsanto Co., 684 F.2d 1226 (7th Cir. 1982), aff'd, 465 U.S. 752 (1984), the Seventh Circuit affirmed the trial court's consideration of testimony as to antitrust damages by a witness experienced in damage computation, notwithstanding the witness' admitted lack of expertise in any of the fields of statistics, economics, cost accounting or computers used in preparation of his testimony. See also California Steel & Tube v. Kaiser Steel Corp., 650 F.2d 1001 (9th Cir. 1981).

Because this outcome results from a decision in conflict with the federal rules of evidence as well as uniform precedent, it merits review by writ of certiorari.

III. The Decision to Exclude Parol Evidence of the Meaning of Words in a Letter Offered to Satisfy the Statute of Frauds Is Contrary to the Uniform Commercial Code and In Direct Conflict With the Decisions of Other Circuits.

The Fourth Circuit holds that the statute of frauds set forth in Section 2-201 of Maryland's Uniform Commercial Code bars Kline's recovery for breach of contract because as a matter of law no quantity is stated in Lorillard's January 15, 1986 letter to Kline. According to the decision below:

> The January 15, 1986 letter from Lorillard to Kline [19] is totally silent as to quantity despite Kline's contention that the words "direct basis" indicate quantity. A standard definition of quantity is that it is 'a particular, indefinite, or considerable amount of anything, . . . an exact or specified amount or measure.' *Random House College Dictionary*, 1080 (1982). Precisely how one converts 'direct basis' into some variety of amount is not adequately explained. There simply is no arguable connection in the law or in the English language between "direct basis" and "amount." Under Maryland law, the testimony of Kline, that for a few weeks in December 1985 and January 1986, Lorillard had filled his orders and extended certain credits and discounts, did not supply the missing ingredient—some indication of quantity.

(App. 8a-9a).

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[19] The referenced letter was not the only Lorillard writing in evidence available to prove a requirements contract. Lorillard's internal forms on direct purchasing instruct its salesmen to "move as much of each customer's total business into standing orders to automatically satisfy the customer's inventory requirements . . ." This is entirely supportive of Kline's testimony that, by trade usage and custom, "direct basis" means "requirements".

The court's reasoning is clearly at odds with the language and spirit of the Code, which rejects this approach as inconsistent with its underlying purpose to "simplify, clarify and modernize the law governing commercial transactions," and to "permit the continued expansion of commercial practices through custom, usage and agreement of the parties. . ." Md. Comm. Code Ann. § 1-102 (2)(a)(b) (1975). In this regard, a "course of dealing between parties and any usage of trade . . . give particular meaning to . . . terms of an agreement." § 1-205(3). As the Official Comment to Section 1-205 explains:

> This Section makes it clear that:
>
> 1. This Act rejects both the "lay dictionary" and the "conveyancer's" reading of a commercial agreement. Instead, the meaning of the agreement of the parties is to be determined by the language used by them and by their action, read and interpreted in the light of commercial practices and other surrounding circumstances. The measure and background for interpretation are set by the commercial context which may explain and supplement even the language of a formal or final writing.

Where, as here, a requirements contract is concerned, the Code "applies to this specific problem the general approach of this Act which requires the reading of commercial background and intent into the language of any agreement . . ." § 2-306, Official Comment 1.

If even a formal or final document's language derives its definition from the "commercial context," this can be no less true of the words of an informal statute of frauds memorandum. Indeed, Section 2-202(a), following the Statute of Frauds section, provides that terms "with respect to which the confirmatory memoranda of the parties agree . . . may be explained", even if unambiguous, by "course of dealing or usage of trade (§ 1-205) or by course of performance (§ 2-208) . . ." As the Official Comment to Section 2-202 indicates:

1. This section definitely rejects:

(a) Any assumption that because a writing has been worked out which is final on some matters, it is to be taken as including all the matters agreed upon;

(b) The premise that the language used has the meaning attributable to such language by rules of construction existing in the law rather than the meaning which arises out of the commercial context in which it was used; and

(c) The requirement that a condition precedent to the admissibility of the type of evidence specified in paragraph (a) is an original determination by the court that the language used is ambiguous.

Finally, the Statute of Frauds, § 2-201(1), itself refers to "the quantity of goods *shown* in" a writing, which contemplates consideration of extrinsic evidence of meaning, a matter to be demonstrated like any other fact.

At trial, Mr. Kline testified unambiguously that the terminology "direct basis" used by Lorillard in the January 15, 1986 letter meant, by reference to his long experience in the industry and to his extended prior dealings with Lorillard, that Kline would purchase its requirements from Lorillard. The Fourth Circuit's rejection of Kline's parol evidence and insistence on a dictionary approved quantity term does far more than distort the Maryland Commercial Code,[20] depriving Kline of its

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[20] The Maryland Court of Special Appeals decision in Cavalier Mobile Homes v. Liberty Homes, Inc., 53 Md. App. 379, 395 (1983) does not support the Fourth Circuit. In Cavalier, a collection of separate sales invoices did not in themselves indicate "that quantity is to be measured by requirements." Kline's testimony, in contrast, directly connects specific words in the January 15, 1986 letter to trade usage and course of dealing, supplying the ingredient missing in Cavalier sufficient to satisfy the Statute of Frauds. (App. 21a). (J. Sprouse, dissenting).

entitled judgment.[21] The opinion below conflicts with the decisions of other circuits on this issue, and thereby undermines the main objective of the Code, to promote "uniformity throughout American jurisdictions".[22]

These other courts hold, correctly, that the critical issue in interpreting an asserted quantity term is the intent of the parties. Thus in *Kansas Power & Light Co. v. Burlington Northern*, 740 F.2d 780, 789 (10th Cir. 1984), the Tenth Circuit, relying on parol evidence as to the purpose of a transaction, found the writing before it sufficient because when "one considers these facts, it would make no sense to read the contract as anything other than a requirements contract." Similarly, in *O.N. Jonas Co., Inc. v. Badische Corp.*, 706 F.2d 1161, 1164 (11th Cir. 1983), the Eleventh Circuit held "the yarn" sufficient to state quantity, because the "testimony at trial" so indicated. As that court observed:

> The official comments in the Uniform Commercial Code emphasize that this section mandates "the reading of commercial background and intent" into the

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[21] As Maryland's Court of Appeals suggested in Maryland Supreme Corp. v. Blake Co., 279 Md. 531, 549-50 (1977), one may be "precluded by the doctrine of equitable estoppel from asserting the statute." There was evidence introduced at trial to establish that Lorillard had caused Mr. Kline to repurchase Merrey at substantial cost, in reliance on Lorillard's commitment to supply Kline's reasonable requirements on credit. Indeed, the second Jury Interrogatory inquires whether "the plaintiff proved that Lorillard is precluded from asserting the writing requirement by estoppel?" The jury did not respond to this question only because it had already found as a fact that the January 15, 1986 letter contains a quantity term sufficient under Section 2-201.

[22] General Comment of National Conference of Commissioners on Uniform State Laws and The American Law Institute, I Uniform Commercial Code, Uniform Laws Annotated (1989), p. xv. The ALI instructs courts to apply the comments of the Code substantively, in furtherance of its uniformity creating function. Accord, Section 1-102(c), stating the U.C.C.'s purpose and policy to "make uniform the law among the various jurisdictions."

language of any agreement. U.C.C. sec. 2-306 official comment 1 ((1978). This provision precludes a finding that a contract for requirements is too indefinite, "since the quantity is determined by the actual good faith requirements of the particular party." U.C.C. sec. 2-306 official comment 2 (1978). Professor J.J. White concludes that under this provision:

> "A party who seeks to invalidate a requirements contract therefore bears a heavy burden. Certainly the mere existence of an open quantity term does not support invalidation, since indefiniteness is inherent in requirement contracts."
>
> J. White & R. Summers, Uniform Commercial Code 122 (1980).

The decision below represents the only judicial rejection of parol evidence that particular written words offered to satisfy the Statute of Frauds connote quantity. Because this holding is so clearly contrary to the spirit and function of the Uniform Commercial Code, creating conflict where consensus is desired, the Petition for its review should be granted.

CONCLUSION

For the foregoing reasons, we respectfully submit that a writ of certiorari be granted.

Respectfully submitted,

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